95-1751

Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

DAVON, INC.,

Petitioner,

vs.

DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the 40-year retroactive application of the Coal Industry Retiree Health Benefit Act of 1992, confiscating the property of Davon, violate the Takings Clause of the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The caption contains the names of all the parties to this proceeding. Petitioner Davon, Inc. has no parent or subsidiary corporations. The names of the trustees of respondent United Mine Workers of America Combined Benefit Fund are Michael H. Holland, William Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles and Gail R. Wilensky.

This case was decided by the Court of Appeals with a companion case, which had the following additional parties: Templeton Coal Company, Inc., Sherwood-Templeton Coal Company, Inc., Princeton Mining Company, Inc. and Berwind Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Davon, Inc. petitions the Court to issue a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 25, 1996.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 75 F.3d 1114 (7th Cir. 1996), and reproduced as Appendix ("App.") A. The decision of the United States District Court for the Southern District of Indiana was entered on April 4, 1995 and is reproduced as Appendix B. The District Court incorporated in its decision the companion case, *Templeton Coal Company, Inc., et al. v. Donna E. Shalala, et al.*, which is reported at 882 F. Supp. 799 (S.D. Ind. 1995) and reproduced as Appendix C.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 25, 1996. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

The Coal Industry Retiree Health Benefit Act of 1992 is codified at 26 U.S.C. §§ 9701-9722 and is reproduced as Appendix D.

STATEMENT OF THE CASE

Davon claims in this lawsuit that the application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701, *et seq.* ("Act"), violates the Takings Clause of the Fifth Amendment. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

Davon is what is now commonly called a "super reachback company" under that Act – a company which: (i) left the coal industry nearly 40 years before passage of the Act; (ii) never participated in the benefit funds covered by the Act; and (iii) did not participate in the promises enforced by the Act – promises (made by others) to finance those funds and provide retiree health benefits to miners. Those funds were created and those promises were made more than 20 years *after* Davon's predecessor sold its coal business and left the industry forever.

This case is significantly different from the two other cases involving the 1992 Coal Act which have been

brought to the Court.[1] Neither of those petitions involved the Takings Clause or a super reachback company. The companies in both cases had participated in the benefit funds and made the promises covered by the Act.

The following chronology describes the Act's application to Davon.

1. 1950: The NBCWA establishes the 1950 Welfare and Retirement Fund. Neither the agreement nor the fund provides for vested benefits.

On March 5, 1950, the National Bituminous Coal Wage Agreement ("NBCWA") of 1950 became effective. The NBCWA is a multi-employer collective bargaining agreement between coal mine operators and the United Mine Workers of America ("UMWA"). Each NBCWA has been in effect for a limited duration, from one to four years.

The 1950 NBCWA created the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W&R Fund") to provide welfare and retirement benefits to UMWA miners. Employers who signed the 1950 NBCWA agreed to pay 30¢ per ton of coal they produced to the 1950 W&R Fund. This obligation was "several and not joint" and continued only "during the life of the agreement." Signatory employers did not promise or guarantee welfare or retirement benefits; they promised

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[1] *Barrick Gold Exploration, Inc., et al. v. Marty D. Hudson, et al.*, No. 94-1938, *cert. denied*, 116 S. Ct. 64 (1995), and *LTV Steel Company, Inc., et al. v. Donna E. Shalala, et al.*, No. 95-63, *cert. denied*, 116 S. Ct. 298 (1995).

only to pay the per ton royalty to the Fund. The 1951 and 1952 NBCWAs made no changes to this.

From the beginning, the 1950 W&R Fund provided no vested benefits.

2. January 28, 1954: N.Y. Coal Company sells its coal mining business and goes out of that business entirely and forever.

Before January 28, 1954, the New York Coal Company ("N.Y. Coal"), Davon's predecessor, was in the coal mining business and presumably signed the 1950, 1951 and 1952 NBCWAs. On January 28, 1954, N.Y. Coal sold its entire coal mining business, including the use of its trade name, to the Sunnyhill Coal Company of Pittsburgh. N.Y. Coal agreed, as part of the sale, not to engage in the coal business. Neither N.Y. Coal nor its successor Davon has engaged in the coal business in any way since January 28, 1954.

Any obligation of N.Y. Coal to contribute to the 1950 W&R Fund automatically ceased in January 1954 when it sold its coal mining business and stopped producing coal; the obligation was contingent on coal production.

3. 1954-1974: The 1950 W&R Fund continues as before; neither the employers nor the fund provide vested benefits to miners.

From 1955 to 1974, the coal operators and the UMWA negotiated 8 NBCWAs, none of which substantively changed the 1950 W&R Fund, or the employers' and employees' relationship with it. Throughout this period,

the 1950 W&R Fund did not provide vested benefits. The Fund's 1955 annual report said: "No vested interest in the Fund extends to any beneficiary." The 1974 report said: "[T]he [Fund] . . . has not granted any individuals vested rights to . . . benefits." The Fund also told each miner and other beneficiary, in writing, that he or she had no vested benefits.

4. 1974: The 1950 W&R Fund is converted to a pension-only fund, and ceases to provide health benefits.

In 1974, the coal operators and the UMWA reached agreement on an NBCWA which significantly changed UMWA-sponsored benefits. The 1950 W&R Fund was converted to a pension-only fund. The 1974 NBCWA provided: "Effective December 6, 1974, the name of the 1950 [W&R] Fund is changed to the United Mine Workers of America 1950 Pension Trust." Article XX, § b. All the assets of the 1950 W&R Fund were transferred to the 1950 Pension Trust, and the 1950 Pension Trust became "solely responsible for all indebtedness, accounts payable, claims, causes of actions and other liabilities" of the 1950 W&R Fund. Article XX, § a(1).

Therefore, in 1974, the only UMWA benefit fund or plan to which N.Y. Coal once had an obligation to contribute (over 20 years before), ceased to exist as a provider of health and medical benefits.

5. **1974: 20 years after N.Y. Coal left the coal industry or last employed any miners, two new UMWA health insurance plans are created – the 1950 (est'd. 1974) and 1974 Benefit Funds. The current coal operators (i.e., not Davon) agree to fund them.**

The 1974 NBCWA created two new benefit plans: the 1950 Benefit Fund and the 1974 Benefit Fund. The 1950 Benefit Fund (est'd. 1974) was to pay health benefits to retired miners who stopped work before January 1, 1976. The 1974 Fund provided medical benefits for others, including those who retired January 1, 1976 or after. In addition, the 1974 NBCWA, for the first time, purported to provide lifetime health benefits for retirees. It provided that "[a]ny pensioned miner . . . will retain his Health Services card until death."

The 1950 and 1974 Benefit Funds started with zero funding. The employers and the UMWA agreed that funding for those two funds would come from signatories to the 1974 NBCWA. N.Y. Coal, more than 20 years out of the coal business, had no role in any of this.

6. **1978: Employers then in the coal industry (i.e., not Davon) for the first time agree to guarantee retiree health benefits.**

In 1978, 24 years after N.Y. Coal left the coal industry or last employed any miners, the employers then in the coal industry agreed to the 1978 NBCWA and, for the first time, obligated themselves to provide health benefits to retirees as specified in the 1950 Benefit Fund. Article XX,

§ h of the 1978 NBCWA, the "Guarantee Clause," provided: "Notwithstanding any other provisions of this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement."

7. 1990: The government-sponsored Coal Commission recommends legislation requiring signatories to the 1978 and later NBCWAs to pay more premiums to the benefit funds.

The old 1950 W&R Fund (renamed the 1950 Pension Trust in 1974), the only fund N.Y. Coal ever had an obligation to contribute to, was financially strong in 1954 when N.Y. Coal left the coal business, and has remained strong since, with a net surplus of over $1.5 billion.

However, in 1990, the U.S. Secretary of Labor impaneled the Coal Commission to examine and solve financial problems in the two UMWA health benefit funds established in 1974. The Coal Commission recommended that these plans be financed, in part, by legislatively requiring additional premiums from signatories to the 1978 and later NBCWAs, because the 1978 NBCWA was the first agreement to guarantee lifetime benefits. The Coal Commission recommended that "Congress should impose a statutory obligation to contribute on signatories to the National Bituminous Coal Wage Agreement of 1978 and any successor agreement."

8. 1992: Congress enacts the 1992 Coal Act, and reaches back to 1950, much further than the Coal Commission recommended.

The Coal Industry Retiree Health Benefit Act of 1992 merged the 1950 (est'd. 1974) Benefit Fund and the 1974 Benefit Fund into the UMWA Combined Benefit Fund, effective February 1, 1993. 26 U.S.C. § 9702(a)(2). This new Combined Fund is part of the federal government's budget. See, Budget of the United States Government for Fiscal Year 1995 (U.S. Gov. Printing Office, 1994), Appendix p. 974, and pp. 228-29, 237-38.

The Act follows the basic recommendation of the Coal Commission. However, despite Congress' stated purpose for the Act "to identify persons most responsible for plan liabilities" (Pub. L. 102-486, § 19142(a)(2)), the Act reaches back significantly further than the Coal Commission's recommendation and assigns this obligation to any business which (1) was signatory to the *1950* or later NBCWA, and (2) is still in business of any kind. 26 U.S.C. § 9701(b), (c), § 9706, § 9704. The Act creates three categories of these "assigned operators": the current mine operators (1988 signatories); companies signatory to the 1978 or later NBCWA but not the 1988 NBCWA (now commonly called "reachback companies"); and businesses who were only signatory to a NBCWA before 1978 ("super reachback companies"). 26 U.S.C. § 9706.

Each assigned operator is responsible for paying a monthly health and life insurance premium to the Combined Fund for each miner and dependent assigned to that operator by the Secretary. 26 U.S.C. § 9704(a)(1-2). For the Combined Fund plan year beginning October 1,

1993, the annual premium was $2,245.83 per beneficiary. The per-beneficiary premium will increase each year by approximately 4-8%. 26 U.S.C. § 9704(b)(2) (premium increased each year according to medical component of Consumer Price Index); CPI Detailed Reports, U.S. Dept. of Labor, Bureau of Labor Statistics (1984 to present).

Each assigned operator is also required to pay a proportionate share of the premium for Fund beneficiaries who are not assigned to an operator. 26 U.S.C. § 9704(a)(3) and (d). These unassigned beneficiaries never worked for the operators who must now pay their premiums. This group will continue to grow. When an assigned operator goes out of business (as a result of paying these premiums or otherwise), the beneficiaries assigned to that business will be placed in the unassigned pool. 26 U.S.C. § 9704.

Section 9707 imposes a penalty of $100 per day, per beneficiary, for each monthly payment an assigned operator does not pay. The penalty is paid to the Government.

9. 1993: N.Y. Coal, out of the coal business for 40 years, has a different owner, an individual, and has been reincorporated, merged and renamed Davon, Inc. Davon is assigned responsibility for 98 miners and dependents and assessed a first year premium of $327,428.80.

N.Y. Coal was a Maine corporation. In the 1950s, after N.Y. Coal sold and went out of the coal mining business, Edwin Davis and Robert Patton purchased the stock of N.Y. Coal. Any obligation N.Y. Coal may have had under the 1950, 1951 or 1952 NBCWAs, or to the 1950 W&R

Fund, had been fully satisfied. Davis and Patton changed the name of the corporation to Davon, Inc. In 1979, Davon (Maine corporation) and Davon, Inc. (a newly created Ohio corporation) merged, with Davon, Inc. (Ohio corporation) as the survivor. Since 1989, all the stock of Davon has been owned by John B. Patton (R. Patton's son).

Davon has never been in the coal business. It has 275 employees, working in businesses unrelated to coal.

In October 1993, the Secretary assigned Davon the responsibility, and the Combined Fund assessed Davon a premium, for 98 Combined Fund beneficiaries. Davon's first year premium was $327,428.80, due monthly beginning October, 1993. Sections 9704 and 9707 of the Act obligate Davon to pay this premium to the Combined Fund or pay fines to the Government, which would amount to about $21.5 million in the first year, $61 million in the second, and significantly more each year after. The fines would bankrupt Davon in the first year. Davon has made each monthly payment.

10. The miners assigned to Davon did not retire from N.Y. Coal.

None of the miners assigned to Davon had retired from N.Y. Coal. These miners generally had little employment with N.Y. Coal, all before 1954. Most last worked for N.Y. Coal when they were still in the first half of their normal working lives. On average, they last worked for N.Y. Coal at age 42, 23 years from normal retirement. They then went on to work for other employers, in and out of the coal industry, for much longer periods, and then presumably retired.

11. The Act requires Davon to pay ever increasing premiums to the Combined Fund for the next 50 years, whether or not the Fund needs them.

The Combined Fund has amassed a surplus of over $100 million, but this surplus will have no effect on Davon's premium obligations. Under 26 U.S.C. § 9704(b), the per beneficiary premium is established, as of February 1, 1993, and is indexed to any increase in the consumer price index. Davon's per beneficiary premium will only increase each year.

Under the Act, Davon's obligation to pay a percentage share of the premiums for unassigned beneficiaries will continue until there are no more such beneficiaries of the Fund, even if the miners and dependents assigned to Davon have already deceased. 26 U.S.C. § 9704(a), (d), and (f). The Combined Fund estimates that it will continue to have beneficiaries through the year 2040.

Davon faces 50 years of forced payments under the Act.[2]

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[2] If Davon is relieved of Coal Act liability through this lawsuit, this will not affect the benefits of any beneficiary or the financial condition of the Combined Fund. Under the Act, the beneficiaries assigned to Davon (or to any other super reachback relieved of liability) would be reassigned or reclassified as unassigned beneficiaries under 26 U.S.C. §§ 9706, 9704. Their premiums would be satisfied from the funds transferred from the Government's Abandoned Mine Reclamation Fund as provided in 26 U.S.C. § 9705(b), or be paid by the 1978 and later coal operators who promised these benefits. 26 U.S.C. § 9704(d).

REASONS FOR GRANTING THE WRIT

I. The Act, as applied to Davon, violates the Takings Clause as interpreted by the decisions of this Court.

The Act confiscates Davon's property, with no compensation in return, to finance a government program. That is an unconstitutional taking. The Government's taking of someone's money is a Fifth Amendment taking. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

"[T]he Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 2316, 129 L. Ed. 2d 304, 316 (1994), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Act as applied to Davon does just that. Davon has no more connection with or responsibility for the current obligation to provide health insurance benefits to miners than does the public as a whole. Davon is a legal and practical stranger to this matter.

> [The Takings Clause's] essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem *that is none of his creation.*

Pennell v. City of San Jose, 485 U.S. 1, 23 (1988) (Scalia, J., concurring and dissenting) (emphasis added).

Davon had no role in the creation of the social problem addressed by the Act: unfunded vested health benefits for coal miners and their dependents. There were no

vested health benefits for miners, much less their dependents, in January 1954 when N.Y. Coal left the coal industry. The beneficiaries' entitlement to benefits exists solely as a result of the creation in 1974 of the 1950 and 1974 Benefit Funds (which neither Davon nor N.Y. Coal participated in), the promises made then by employers other than Davon or N.Y. Coal to finance those funds from zero, and the promises made by others in 1978 and later to guarantee those benefits.

Davon's *only* connection with any of the individuals assigned to it is that N.Y. Coal employed them for brief periods over 40 years ago under circumstances unconnected to matters covered by the Act. This is not a basis to make Davon responsible for their health insurance because their entitlement to those benefits derives not from N.Y. Coal's employment of them in 1953, but from the acts of others in 1974, 1978 and since.

This conclusion is confirmed by the three factors the Court has held to have "particular significance" in deciding when the Takings Clause "require[s] that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons": (1) the economic impact of the governmental action; (2) its interference with reasonable investment-backed expectations; and (3) the character of the governmental action. *Hodel v. Irving*, 481 U.S. 704, 714 (1987); *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 224-25 (1986).

First, the economic impact on Davon is far more substantial than that found to be an unconstitutional taking in *Webb's Fabulous Pharmacies*. In *Connolly*, the

Court said that economic impact should be measured according to proportionality, focusing on whether the liability imposed by the legislation on the employer is out of proportion to its experience with the plan to which it made contributions. 475 U.S. at 225, 226. Davon had no experience with the benefit plans covered by the Act, so any liability is not proportionate. The liability imposed on Davon is completely out of proportion to its brief experience with the old 1950 W&R Fund. It faces 50 years of escalating premiums purportedly as a result of 3 years of employment of miners under the 1950 NBCWA.

Second, the Act substantially interferes with Davon's investment-backed expectations. Davon did not and could not have foreseen this 40-year retroactive liability.

Third, the character of the governmental action here is plain: the Act compels the complete and permanent surrender by Davon of millions of dollars of its money, with no compensation in return, for the purpose of financing a government program. While the Combined Benefit Fund is called a private entity, it was created by statute, and Congress treats the Fund's income and expenses as part of the federal budget. The Act specifies the benefits which may be paid and the premiums which are to be charged. It governs the manner in which the Fund is to be administered, including the use of managed care, selecting Trustees, amounts to be spent on administration and compelled use of health services plans. 26 U.S.C. §§ 9702, 9703, 9704. It is, in any case, not constitutionally significant that the Fund may be called a private entity, as the Court has repeatedly held that an unconstitutional taking occurs when legislation results in the transfer of property from one private party to another; no

property need go to the Government. *Hodel v. Irving, supra*; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-1005, 1010-1016 (1984).

II. The courts of appeals have interpreted *Connolly v. Pension Benefit Guarantee Corp.* to establish constitutional principles that conflict with other contemporaneous decisions of this Court and which make the Takings Clause inapplicable to most personal property.

The Court of Appeals in this case relied on *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211 (1986) (see App. A-30, 35). In *Blue Diamond Coal Co. v. Secretary of Health and Human Services*, ___ F.3d ___, 1996 WL 123094, 1996 U.S. App. Lexis 4937 (6th Cir. March 21, 1996), decided shortly after this case, the Sixth Circuit relied on the Seventh Circuit's decision in this case and *Connolly* to decide that the Act did not violate the Takings Clause as applied to Blue Diamond, another super reachback company. In both cases, the courts of appeals lifted statements from *Connolly* and mechanically applied them with no attempt to identify or accommodate the significant differences between these cases and *Connolly*. As a result, the lower courts have misread *Connolly* to establish constitutional principles which, in fact, go well beyond *Connolly*, conflict with other contemporaneous decisions of this Court, and effectively render the Takings Clause inapplicable to most takings of personal property.

In *Connolly*, and the nearly identical case of *Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), the Court upheld the Multi-Employer Pension

Plan Amendments Act of 1980 ("MPPAA") (amendments to ERISA) under the Takings Clause. *Connolly* involved a facial Takings Clause challenge. The application of MPPAA to the employers in *Connolly* and *Concrete Pipe* was substantially different from the application of the Act to Davon and other super reachback companies. The employers in the MPPAA cases had joined multi-employer pension plans which promised vested pensions for covered employees. The employers knew when they joined that the plans promised such vested and defined pensions. The plans were already heavily regulated by ERISA. MPPAA required these employers, when they withdrew from the plans they joined, to pay to those plans withdrawal liability to cover their share of the plans' unfunded liabilities for vested benefits.

The Court said that, as to MPPAA, "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, [the Government] requir[es] a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good. . . . " 475 U.S. at 225.

The courts of appeals have taken that statement, which was applicable to MPPAA, and read it to adopt the following constitutional rule to be applied mechanically by the lower courts in other cases: There is no Takings Clause violation where (1) the Government does not physically invade someone's property; (2) the Government does not take the property to possess it for itself; and (3) the governmental action is for the benefit of the

common good. See *Davon*, App. A-35-36; *Blue Diamond*, 1996 WL 123094 at pp. *10-*11, 1996 U.S. App. Lexis 4937 at p. *28. Such a rule goes way beyond *Connolly*, conflicts with this Court's other Takings decisions, and effectively reads the Takings Clause out of the Constitution.

(1) Physical Invasion. Physical invasion, as interpreted by the courts of appeals, renders the Takings Clause inapplicable to most personal property; it certainly makes it inapplicable to the taking of money or intangible personal property. However, this Court has applied the Takings Clause to protect such personal property and, in cases decided in the same period as *Connolly*, found unconstitutional takings when there was less physical invasion than there is here.

In *Webb's Fabulous Pharmacies, Inc.*, the Court applied the Takings Clause to protect money. The Court held that it was unconstitutional for a county court to retain the interest it earned on private funds deposited with that court. The county court did not necessarily deprive Webb's of anything because the court did not take from the principal funds Webb's deposited in the account, and the court could have maintained the funds in an interest-free account. 449 U.S. at 161. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court applied the Takings Clause to protect trade secrets, intangible personal property. The Court held that the EPA's disclosure to the general public of mandatorily-registered trade secrets belonging to Monsanto amounted to an unconstitutional taking. While Monsanto was deprived of some of its competitive advantage, it did not lose the underlying product. There was no physical invasion like the courts of appeals have concluded is required by *Connolly*.

The courts of appeals' interpretation of *Connolly* cannot be squared with *Webb's Fabulous Pharmacies*, *Monsanto* or the Takings Clause.

(2) Governmental possession. The Court has repeatedly found an unconstitutional taking where the Government has not acquired ownership in or possession of the property taken, but where instead the legislation has resulted in the transfer of the property to another private entity for some congressionally-conceived purpose. In *Hodel v. Irving*, 481 U.S. 704 (1987), the legislation provided that certain fractional parcels of land belonging to individual Indians would, upon their death, pass to their tribe instead of to their heirs. The Court held that this was an unconstitutional taking. In *Monsanto*, the Court said: "It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking, for courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." 476 U.S. at 1004-1005.

(3) Readjusts economics for the common good. This proves too much as an absolute constitutional rule. Even the most extreme cases of unconstitutional taking, such as the uncompensated condemnation of private land to build a highway, dam or park, or the confiscation of money for these purposes, could be regarded as a program that "adjusts the benefits and burdens of economic life to promote the common good. . . . " App. at A-36. That fact alone does not insulate such takings from a finding of unconstitutionality. Thus, in *Hodel v. Irving*, the Court acknowledged that the common and economic good was better served by combining the fractionalized

parcels when the owners died (see 481 U.S. at 706-710, 712-713), but nevertheless found an unconstitutional taking.

* * *

The Court should grant the petition to correct the courts of appeals' misreading and misapplication of *Connolly*. If the petition is not granted, the courts of appeals and, accordingly, the district courts, will continue with their overly broad reading and mechanical misapplication of *Connolly*. The Court should not wait for a conflict to develop among the circuits. The Sixth Circuit's unhesitating reliance on the Seventh Circuit's decision in this case demonstrates that no conflict is reasonably forthcoming.

III. The Court should grant the petition to delineate the difference between governmental action which appropriately regulates relationships and conduct, and that which unconstitutionally confiscates one's property.

The critical factors in *Connolly* are not those identified by the courts of appeals. Instead, in *Connolly*, the Court upheld MPPAA under the Takings Clause based principally on its overall assessment of the character of the governmental action involved: MPPAA merely regulated the employer's voluntary relationship with the pension plan in a way that affected (perhaps significantly) the employer's assets; MPPAA did not confiscate the employer's property for an unconstitutional taking. The Court's conclusion in *Connolly* presupposed a relationship between the employer and the vested pension plan. In fact, the Court specifically based its holding on its

finding that MPPAA only "requir[es] a withdrawing employer to fund *its* share of plan obligation incurred during *its* association with the plan." 475 U.S. at 225 (emphasis added).

Therein lies the significant constitutional difference between the MPPAA cases and this case. MPPAA involved the Government's regulation of the employers' voluntary relationship and conduct, with incidental effects on their property. In contrast, the Coal Act, as applied to super reachbacks, amounts to outright confiscation of property to finance a government program.

In MPPAA, Congress was, as the Court said in *Connolly*, "adjust[ing]" the existing relationship voluntarily created by the parties. *Id.* The employers covered by MPPAA had voluntarily agreed to and in fact participated in a regulated pension plan which they knew, when they joined, promised vested pension benefits. Under the 1992 Coal Act, however, as to Davon and other super reachbacks, there was no such relationship. Davon never participated in either of the benefit funds covered by the Act. Those funds were not created until 20 years after N.Y. Coal sold its coal business. Davon did not make or receive the benefit of the industry promises in 1974 to finance those funds, or in 1978 to guarantee lifetime health benefits to UMWA retirees. Further, the old 1950 W&R Fund expressly did not incur any obligations prior to 1954 when N.Y. Coal contributed to it.

Therefore, the 1992 Coal Act, as applied to Davon and other super reachbacks, does not amount to governmental regulation of a relationship or conduct because there is no relevant relationship or conduct to regulate.

Davon is a legal and practical stranger to this matter. Congress, by indiscriminately requiring Davon to pay for this social problem that is none of its creation, has confiscated its property to finance a government program.

The Court should grant the petition to identify and delineate the important constitutional distinction between permissible regulation and unconstitutional confiscation. This case, with its strong and clear facts, which are significantly different from the MPPAA cases on the critical points, is an excellent case for the Court to define this distinction.

IV. The Court should grant the petition to confirm that the Takings Clause restricts Congress' authority to enact retroactive confiscatory legislation.

The courts of appeals' interpretation of *Connolly* leaves even the most extreme retroactive and confiscatory legislation free from constitutional limitations, as long as it can be characterized as beneficial economic legislation. A fair reading of the Seventh Circuit's decision in this case and the Sixth Circuit's decision in *Blue Diamond* shows that, based on the courts of appeals' interpretation of *Connolly*, the Takings Clause imposes no greater constitutional limitation on such legislation than so-called substantive due process. However, as the Court recently reiterated in *Dolan v. City of Tigard*, the Takings Clause, as an express provision in the Bill of Rights, provides real constitutional rights:

> [S]imply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds

> that it violates a provision of the Bill of Rights. * * * We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .

___ U.S. ___, ___, 114 S. Ct. 2309, 2320, 129 L. Ed. 2d 304, 320-21 (1994).

The Court should grant this petition to confirm that the Takings Clause limits Congress' power to enact retroactive confiscatory legislation. While the Court in *Connolly* was concerned about interpreting the Takings Clause to impose too great a limitation on appropriate economic legislation (see, 475 U.S. at 222-24),[3] the Court certainly did not mean to read the Takings Clause out of the Constitution. Yet that is how the courts of appeals have interpreted *Connolly*.

Neither petitioner nor any other party in this or other Coal Act case has been able to identify any other court decision involving legislation with the retroactive and confiscatory effect of the 1992 Coal Act. This extreme case is a worthy one for the Court to identify the point at which the Takings Clause protects citizens from such legislation. Justices O'Connor and Powell concurred in the Court's Takings Clause decision in *Connolly*, but stated that, at some point, Congress goes beyond what the Constitution allows. *Id.* at 228-29. This is that case.

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[3] The fact that *Connolly* involved a facial challenge to MPPAA only highlighted this concern.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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